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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 605

TOM WATSON, AS ATTORNEY GENERAL OF THE STATE OF FLORIDA,

Petitioner,

vs.

J. EDWIN LARSON, AS TREASURER OF THE STATE OF FLORIDA, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND BRIEF IN SUPPORT THEREOF.

J. TOM WATSON,
As Attorney General of the State of Florida;

SUMTER LEFFLER,
As Assistant Attorney General of the State of Florida;

ERNEST W. WELCH,
As Assistant Attorney General of the State of Florida;

FRED M. BOWEN,
As Assistant Attorney General of the State of Florida,

Attorneys for the Petitioner.

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PETITION FOR REVIEW ON WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

J. Tom Watson, as Attorney General of the State of Florida, and petitioner herein, hereby petitions this Honorable Court for a writ of certiorari to review that certain opinion and judgment of the Supreme Court of the State of Florida, it being the court of last resort of the said state, rendered and filed on December 16, 1947, in the case of J. Tom Watson, as Attorney General of the State of Florida, appelant, *v.* J. Edwin Larson, as Treasurer of the State of Florida, et al., appellee, therein lately pending, by which opinion and judgment the court held valid and constitutional chapter 23616, laws of Florida, acts of 1947, and the

transfer of two million dollars ($2,000,000.00), from the treasury of the State of Florida to the United States of America for use by the United States of America or the National Park Service thereof in paying for the acquisition of all privately owned and other lands and interests within the Everglades National Park area by the United States of America or the National Park Service thereof, and in paying for the costs and expenses required in connection with such acquisition.

A duly certified copy of which opinion and judgment, of the Supreme Court of the State of Florida, is included in the record of this case, to which reference is hereby made (R. 27-30).

Summary and Short Statement of Matter Involved

The legislature of the State of Florida, at its 1947 regular session, enacted chapter 23616, laws of Florida, acts of 1947, which became a law and took effect on April 24, 1947, by which law there was "appropriated out of the General Revenue Fund of the State of Florida the sum of Two Million Dollars ($2,000,000.00) for providing the State of Florida with a fund in such amount to be transferred by the State of Florida (by warrant upon requisition therefor by the Governor of the State of Florida) to the United States of America for use by the United States of America or the National Park Service thereof in paying for the acquisition of all privately owned and other lands and interests within the Everglades National Park area by the United States of America or the National Park Service thereof, and in paying for the costs and expenses required in connection with such acquisition." On June 17, 1947, the said Attorney General filed his bill of complaint, in the Circuit Court in and for Leon County, Florida, seeking a declaratory decree, under chapter 87, Cumulative Supplement to Florida Statutes, 1941, as to the construction, va-

lidity and constitutionality of said chapter 23616, laws of Florida, acts of 1947. A duly certified copy of which bill of complaint is included in the record of this case, to which reference is hereby made (R. 1-4). The bill of complaint, upon motions of the defendant and the intervenors (R. 6-7, 12-13, and 17-18), was dismissed by order of the Circuit Court, dated June 23, 1947, a duly certified copy of which order is included in the record of this case, to which reference is hereby made (R. 18). On August 6, 1947, the above order of dismissal was taken by appeal to the Supreme Court of the State of Florida (R. 19), and on August 15, 1947, the assignment of errors was filed, the fourth, fifth, ninth and tenth of which raised substantial Federal questions (R. 19-21). Notwithstanding the above Federal questions the Supreme Court of the State of Florida affirmed the order of dismissal of the lower court, by which affirmance the said Supreme Court erroneously overruled the Federal questions in the case to the prejudice of this petitioner and of the people of the State of Florida.

Statement as to Jurisdiction

This case is one over which this Court has jurisdiction under the provisions of sub-section (b) of section 344 of Title 28 of the United States Code, it being a case "Wherein a final judgment or decree has been rendered or passed, by the highest court of a state in which a decision could be had," where there was drawn in question the validity of a statute of a state on the ground of its being repugnant to the constitution of the United States and where property of the citizens of the State of Florida is, by reason of said statute, transferred to the United States without due process of law. The federal questions presented will more fully hereinafter appear.

The Questions Presented

The federal questions presented, both to the Supreme Court of the State of Florida and to this Court, are evidenced by the fourth, fifth, ninth and tenth assignments of error, before the Supreme Court of the State of Florida (R. 20-21), which were as follows:

4

The court erred in rendering said final decree in that there existed in the Secretary of the Interior of the United States no legal authority to accept and utilize such money in a manner that the purpose, as expressed in said chapter 23616, might be carried out.

5

The court erred in rendering said final decree in that the State of Florida through the Governor thereof, under federal laws and collaborating Florida laws relating to the Everglades National Park, had no authority to deliver said money to the Secretary of the Interior of the United States at time same was delivered.

9

The court erred in entering said final decree in that the appropriation contained in said chapter 23616 violates the constitutional rights of the tax payers of Florida, which are guaranteed by the constitution of the United States in that the tax funds of the State of Florida are being spent without legal authority.

10

The court erred in entering final decree in that the appropriation contained in said chapter 23616 deprives the taxpayers of Florida of tax funds without due process of law, contrary to the constitution of the United States.

Reasons Relied on for Allowance of Writ

Under the statutes and laws of the State of Florida the Attorney General "has the power and it is his duty among the many devolving upon him by the common law to prosecute all actions necessary for the protection and defense of the property and revenues of the state" (*State* v. *Kress & Co.*, 115 Fla. 189, 155 So. 823, text 827). The "state" is the people in a prescribed territory united into a body politic, so that actions filed by the Attorney General for the protection of the revenue of the state is in effect an action for and in behalf of the people and taxpayers of this state. This being true, any statute or law enacted by the law making body of the state, making an unlawful distribution of any of the funds or revenues of the state, deprives the people and taxpayers of the state of their property without due process of law, contrary to the constitution of the United States. This petitioner contends that chapter 23616, laws of Florida, acts of 1947, authorizes the tax funds of the State of Florida to be spent without legal authority, thereby depriving the people and taxpayers of the State of Florida of their tax funds and revenues without due process of law, contrary to the constitution of the United States. The theory of the petitioner as to this question is that said chapter 23616 deprives the people and taxpayers of the state of their tax funds and revenues without due process of law, in that:

1. The legislature has no control over the United States Government or any agency thereof, and therefore the legislative directives contained in said act in the following words:

> ". . . for use by the United States of America or the National Park Service thereof in paying for the acquisition of all privately owned and other lands and interests within the Everglades National Park area by

> the United States of America or the National Park Service thereof, and in paying for the costs and expenses required in connection with such acquisition."

is completely inoperative and ineffective to in any manner control the purpose of uses to which said funds may be applied. Therefore, the only operative words in Section 1 of Chapter 23616, are:

> "There is hereby appropriated out of the General Revenue Fund of the State of Florida the sum of Two Million Dollars ($2,000,000.00) for providing the State of Florida with a fund in such amount to be transferred by the State of Florida (by warrant upon requisition therefor by the Governor of the State of Florida) to the United States of America or the National Park Service thereof . . ."

which constitutes an outright gift of said funds.

2. That neither the National Park Service, nor any other agency of the United States of America, has any power or authority under the laws of the United States to utilize the funds appropriated by chapter 23616 in the manner and for the purposes set forth therein, thereby constituting chapter 23616 as an attempt to appropriate the tax funds of the State of Florida for a purpose which is impossible of legal accomplishment.

3. That the state funds in question were turned over to the United States, or one of its agencies, without there being any federal statute or law authorizing the acceptance and use of the said funds by the said United States or its agency.

WHEREFORE it is respectfully submitted that this petition for review on writ of certiorari to review the opinion and judgment of the Supreme Court of the State of Florida, above identified, in this case should be granted and the

said opinion and judgment reversed, and your petitioner should be granted such other and further relief as to the court may seem just and proper.

J. Tom Watson,
as Attorney General of the State of Florida,
Petitioner.

Sumter Leitner,
Assistant Attorney General,

Ernest W. Welch,
Assistant Attorney General,

Fred M. Burns,
Assistant Attorney General,

Attorneys for the Petitioner.

BRIEF IN SUPPORT OF PETITION FOR REVIEW ON WRIT OF CERTIORARI

The Opinion of the Florida Supreme Court

which is sought to be reviewed by this court on writ of certiorari, was filed on December 16, 1947, but has not yet been officially reported. A copy of such opinion is attached hereto as appendix "A."

Statement as to Jurisdiction

This case is one over which this court has jurisdiction under the provisions of subsection (b) of section 344 of Title 28 of the United States Code, it being a case "wherein a final judgment or decree has been rendered or passed, by the highest court of a State in which a decision could be had," where there was drawn in question the validity of a statute of a State on the ground of its being repugnant to the Constitution of the United States and where property of the citizens of the State of Florida is taken without just compensation, by reason of said statute, and transferred to the United States without due process of law. The federal questions presented will more fully hereinafter appear.

Statement of the Case

The legislature of the State of Florida, at its 1947 regular session, enacted chapter 23616, laws of Florida, acts of 1947, which became a law and took effect on April 24, 1947, by which law there was "appropriated out of the General Revenue Fund of the State of Florida the sum of Two Million Dollars ($2,000,000.00) for providing the State of Florida with a fund in such amount to be transferred by the State of Florida (...) at upon requisition therefor by the Governor of the S... of Florida) to the United States of America for use by the United States of America

or the National Park Service thereof in paying for the acquisition of all privately owned and other lands and interests within the Everglades National Park area by the United States of America or the National Park Service thereof, and in paying for the costs and expenses required in connection with such acquisition." On June 17, 1947, the Attorney General filed his bill of complaint, in the Circuit Court in and for Leon County, Florida, seeking a declaratory decree, under chapter 87, Cumulative Supplement to Florida Statutes, 1941, as to the construction, validity and constitutionality of said Chapter 23616, laws of Florida, acts of 1947, including the questions of taking property without just compensation and due process of law under the federal constitution. The trial court held the said act valid and constitutional, against all contentions, including the federal questions, and dismissed the bill of complaint. The Supreme Court of the State of Florida, upon appeal to that court from the order of dismissal of the trial court, affirmed the said order of dismissal, by which affirmance the said Supreme Court erroneously overruled the federal questions in the case to the prejudice of this petitioner and of the people of the State of Florida. It was contended, by this petitioner, in both the trial court and in the Supreme Court of the State of Florida, that said chapter 23616, laws of Florida, acts of 1947, takes the property and revenues of the state and of the people thereof, without just compensation, including the taxpayers of the state, (that is, the two million dollars appropriated by the said act), and gives it to the United States or an agency thereof without due process of law. In this connection it was contended in the state courts and is contended in this court, by this petitioner, that: (1) neither the United States nor its agency, to which the said two million dollars is payable under the said act, has legal authority to accept and utilize such money for the uses and purposes mentioned

in the said act; (2) the Secretary of the Interior of the United States was and is now without authority or power, under the federal constitution, statutes and laws, to accept and use the said two million dollars; and (3) the said two million dollars were appropriated to a person or agency without authority to accept and use the same in accordance with the said appropriation act or chapter 23616, laws of Florida, acts of 1947. By reason of the above facts the appropriation and payment of the property and revenues of the state and the people thereof to persons and agencies not authorized and empowered to accept and use the same was without due process of law; it was a taking of the property of the people of the state without the due process of law and without just compensation.

Specification of Errors

It is contended by this petitioner that the Supreme Court of the State of Florida erred, when it rendered the opinion and judgment aforesaid in this cause, in the following respects:

1. Said court denied to the people of the State of Florida, and to this petitioner, due process of law as guaranteed by the federal constitution, in that there existed in the Secretary of the Interior of the United States no legal right or authority to accept and utilize the funds appropriated, by said chapter 23616, for the uses and purposes expressed in and by said act.

2. Said court denied to the people of the State of Florida, and to this petitioner, due process of law as guaranteed by the federal constitution, in that the State of Florida, acting by and through the governor thereof, under the federal laws and collaborating Florida laws relating to the Everglades National Park, had no authority to deliver said money to the Secretary of Interior of the United States.

3. Said court denied to the people of the State of Florida, and to this petitioner, due process of law and the equal protection of the laws, in that the appropriation contained in said chapter 23616 violates the constitutional rights of citizens and tax payers of the state in that tax funds of the state are being spent without legal authority.

4. Said court denied to the people of the State of Florida, and to this petitioner, due process of law and the equal protection of the laws, in that said chapter 23616 deprives the citizens and tax payers of the State of Florida of their tax funds without due process of law and without a hearing contrary to the United States Constitution.

5. Said chapter 23616 and the opinion of the Supreme Court of Florida construing it takes the property of the taxpayers of the State of Florida and of the people of the said state without just compensation.

ARGUMENT

Question Presented

For the purposes of this brief the above specifications of error substantially present the following question:

> Does chapter 23616, laws of Florida, acts of 1947, provide for the transfer of tax funds of the state without legal authority, thereby depriving the taxpayers and citizens of the state of their tax funds and revenues without due process of law and without just compensation contrary to the federal constitution?

Powers and Duty of the Attorney General

Under the statutes and laws of the State of Florida the Attorney General "has the power and it is his duty among the many devolving upon him by the common law to prosecute all actions necessary for the protection and defense of the property and revenues of the state" (*State* v. *Kress & Co.*, 115 Fla. 189, 155 So. 823, text 827). The "state" is

the people of a prescribed territory united into a body politic, so that actions filed by the Attorney General for the protection of the property and revenues of the state are in effect actions for and in behalf of the people and the taxpayers of the state.

The Theory of the Petitioner

as to the above question, is that chapter 23616, laws of Florida, acts of 1947, deprives the people and taxpayers of the state of their tax funds and revenue without due process of law, and without just compensation, in that:

1. The Legislature of Florida has no control over the United States Government or any agency thereof, and therefore the legislative directives contained in said act in the following words:

> ". . . for use by the United States of America or the National Park Service thereof in paying for the acquisition of all privately owned and other lands and interests within the Everglades National Park area by the United States of America or the National Park Service thereof, and in paying for the costs and expenses required in connection with such acquisition."

is completely inoperative and ineffective to in any manner control the purposes or uses to which said funds may be applied. Therefore, the only operative words in Section 1 of Chapter 23616 are:

> "There is hereby appropriated out of the General Revenue Fund of the State of Florida the sum of Two Million Dollars ($2,000,000.00) for providing the State of Florida with a fund in such amount to be transferred by the State of Florida (by warrant upon requisition therefor by the Governor of the State of Florida) to the United States of America or the National Park Service thereof . . ."

which constitutes an outright gift of said funds.

Purpose of Due Process Requirement

While the due process requirement in the fourteenth amendment "is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in the Magna Charta. *Munn* v. *Illinois*, 94 U. S. 113, text 123-124, 24 L. Ed. 77, text 83. "In England the requirement of due process of law, in cases where life, liberty and property were affected, was originally designed to secure the subject against the arbitrary action of the Crown, and to place him under the protection of the law . . . a similar purpose must be ascribed to them when applied to a legislative body in this country." *Missouri Pacific Railway Company* v. *Humes*, 115, U. S. 512, text 519, 29 L. Ed. 463, text 465.

"The guaranty of due process of law is one of the most important to be found in the Federal Constitution or any of the amendments; indeed, it has been said that without it the right of private property could not be said to exist, in the sense in which it is known to our laws. By reason of this guaranty it has been stated as a general principle that everyone is entitled to the protection of those fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions and have long been recognized under the common law system. The right is of such importance that the people have never delegated to either the state or Federal Government the power to deprive a person of property except by observing its requirements. . . . The protection extends to rights, in the broadest sense of the term. In the determination of whether the requirement has been observed, regard must be had to substance rather than to form, for the mere form of the proceeding cannot convert the process used into due process of law, if the necessary result is illegally to deprive a per-

son of his property without compensation." (12 Am. Jur. 262, section 569.) "The principle of due process of law had its origin in England as a protection to individuals from arbitrary action on the part of the Crown. It has been said that in this country the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. It is a limitation upon arbitrary power and a guaranty against arbitrary legislation. The primary purpose of the guaranty is the security of the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. Substantially the same idea is embraced in the statement that the great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen." (12 Am. Jur. 271, section 575.) "The due process of law clause in the Fourteenth Amendment of the Federal Constitution does not make the statutes of the several states the test of what it requires. A state cannot make due process of law anything which by its own legislation it chooses to declare such. In other words, legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property. Purely arbitrary or capricious exercise of power whereby a wrongful and highly injurious invasion of property rights is practically sanctioned and the owner stripped of all real remedy is at variance with fundamental principles." (12 Am. Jur. 278, section 581.)

Under the fourteenth amendment to the United States Constitution ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any

person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The above quoted organic provisions are a charter of human liberty and of individual rights against any and all abuses, or arbitrary, unjustly discriminating or essentially unfair exercise of delegated governmental power, authority or duty, of any nature or character whatsoever.

The dominant principles proclaimed in the quoted sections are paramount insuperable commands to all governmental officers, tribunals, boards, commissions, or other agencies or functionaries, who exercise delegated power or authority or duty, whether under the form of law or ordinances or resolutions, substantive or procedural, or not, and whether State, county, district, municipal or other nature or character, and whether legislative, executive, judicial, administrative, municipal, ministerial or other nature or character. (See *State* v. *Woodruff*, 134 Fla. 437, 184 So. 81, text 84.)

2. That neither the National Park Service, nor any other agency of the United States of America, has any power or authority under the laws of the United States to utilize the funds appropriated by Chapter 23616 in the manner and for the purposes set forth therein, thereby constituting Chapter 23616 as an attempt to appropriate the tax funds of the State of Florida for a purpose which is impossible of legal accomplishment and for which the taxpayers of the state receive no compensation.

3. That the state funds in question were turned over to the United States or one of its agencies, without there being any federal statute or law authorizing the acceptance and use of the said funds by the said United States or its agency.

Powers of the State Legislature

The legislature of the State of Florida is powerless to direct the action of the United States or any of its agencies in their official powers, duties and obligations. When, by state appropriation, the money was withdrawn from the state treasury and transferred to the United States or some agency thereof, the legislative attempt to direct the manner and purpose for which such money was to be spent was a nullity, an impotent use of words that ceased to have any effect whatsoever. The control over such money became vested outside the State of Florida or any agency thereof. Whether the money is spent in connection with the Everglades National Park or in connection with some national park in other states, or for any other purpose, is beyond the control of the State of Florida. Whether the money is spent for some state purpose, for some federal purpose, or for some private purpose, after the same was delivered over to the United States or some of its agencies, cannot be controlled by the state legislation, nor may the provisions of the state enactment be enforced by any state agency. When the money was paid over to the United States or its agency the state's control over the same was lost. Manifestly, there can be no legislative determination inherent in said chapter 23616, laws of Florida, acts of 1947, that the money thereby appropriated will be used for any state purpose or even for a public purpose. The net result is a gift of two million dollars to another sovereignty with a half-hearted hope expressed therein that it will be used to buy additional land to be incorporated in the Everglades National Park. This constituted a dereliction of official duty on the part of the state legislature. Upon the question of appropriation of state funds the Supreme Court of Florida, in the case of *State* v. *Lee,* 121 Fla. 360, 163 So. 859, text 868, said:

> "An appropriation of money is the setting it apart officially, out of the public revenue for a special use or purpose, in such manner that the executive officers of the government will have authority to withdraw and *use that money, and no more, for that object, and for no other.* . . . The object of a constitutional provision requiring an appropriation made by law as the authority to withdraw money from the state treasury is to prevent the expenditure of the public funds already in the treasury, or potentially therein from tax sources provided to raise it, without the consent of the public given by their representatives in formal legislative acts."

The Florida legislature, in and by said chapter 23616, neglected and abstained from exercising its exclusive power of deciding how, when and for what purpose the public funds in question may be applied and used. It has in effect said to the United States *we hand you herewith two million dollars; you decide how, when and for what purpose the money of the taxpayers of the State of Florida shall be spent. We hand you the money, you make the appropriation and use the same.* This constitutes purely arbitrary or capricious exercise of powers of government whereby the taxpayers of the State of Florida are deprived of their tax money by legislative fiat, and not by due process of law. This amounts to the taking of the taxpayers' money or property without compensation and without their consent.

Federal Statutes Relating to the Park

The perusal of the federal statutes relating to the Everglades National Park (16 U. S. C. A. sections 410, 410a, 410b, 410c and 410d) reveals that the National Park Service was without authority to receive and utilize the funds appropriated by chapter 23616, laws of Florida, acts of 1947, for the purpose of acquiring title to lands and other interests in the Everglades National Park area. Said federal statutes are set out herein as exhibit "B."

Power to Appropriate Measured by Power to Tax

Since the power of the state legislature to appropriate public funds is no greater than its power to levy a tax for the same purpose, 59 C. J. 198, section 342; 1 Cooley on Taxation, 4th Ed., 388, section 177; Opinion of Justices, — Mass. —, 98 N.E. 611, the question seems to resolve itself into whether or not the state legislature might have levied a tax for the same purposes and turned the same over to the federal government, or one of its agencies, for the same purpose. The fourteenth amendment to the Federal Constitution requires that when private property is taken for a public purpose that such taking must be exercised with due process of law and on just compensation being made. *Cincinnati* v. *Louisville and Nashville Railway Company,* 233 U. S. 390, 32 S. Ct. 267, 56 L. Ed. 481, text 483.

Taxation Must Be for a Public Purpose

Since the adoption of the fourteenth amendment to the Federal Constitution, state taxing power can be exerted only to effect a public purpose and does not embrace the raising of revenue for other than public purposes. *Carmichael* v. *Southern Coal and Coke Company,* 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245, text 1256, and cases there cited. The money in question was raised by state taxation and must be replaced in the state treasury by taxation. Under the mandate of the state legislature, funds of the taxpayers of the state of Florida have been taken and turned over to the Federal Government or one of its agencies to be used by them as they may elect and without limitation. The property of taxpayers and citizens of the state has been taken without compensation and put to other than state public purposes. The taking of funds raised by taxation is, by analogy, the same as taking private property and using it for other than a public purpose without paying the tax-

payer any compensation for such taking. Taxation for any purpose other than a public purpose is in violation of the due process requirement of the fourteenth amendment to the Federal Constitution. *Chicago Motor Club* v. *Kinney*, 328 Ill. 120, 160 N.E. 163, text 167; *State* v. *Middleton*, 215 Ind. 219, 19 N.E. 2d 470 and 20 N.E. 2d 509; *Cleveland* v. *Ruple*, 130 Ohio St. 465, 200 N.E. 507 and 16 C.J.S. 1345, section 648.

In Conclusion

as the appropriation in question cannot be said to have been made for a definite state public purpose, in that neither the state nor any of its agencies have any control over the expenditure and use of the said appropriation after it was paid over to the federal government or its agency, and because the money appropriated was raised by state taxation and must be replaced by state taxation; it amounts to the use of the property of taxpayers raised by taxation for purposes other than public purposes, and the taking of private property by taxation without just compensation, in violation of the fourteenth amendment to the federal constitution. For these reasons the opinion and judgment of the Supreme Court of Florida is erroneous and should be reversed.

Respectfully submitted,

J. Tom Watson,
As Attorney General of the State of Florida,
Petitioner.

Sumter Leitner,
Assistant Attorney General,

Ernest W. Welch,
Assistant Attorney General,

Fred M. Burns,
Assistant Attorney General,

Attorneys for the Petitioner.

EXHIBIT "A"

IN THE SUPREME COURT OF FLORIDA

JUNE TERM, A. D., 1947

En Banc. Leon County

J. TOM WATSON, as Attorney General of the State of Florida, *Appellant*,

vs.

J. EDWIN LARSON, as Treasurer of the State of Florida, *Appellee*

Opinion Filed December 16, 1947

An Appeal from the Circuit Court for Leon County
W. May Walker, Judge

J. Tom Watson, Attorney General; Sumter Leitner and Ernest W. Welch, Assistant Attorneys General, for Appellant.

Ausley, Collins & Truett, Parker, Foster & Wigginton and Will M. Preston, for Appellee.

ADAMS, *J.*:

A bill was filed by Honorable J. Tom Watson, as Attorney General, against Honorable J. Edwin Larson, as treasurer of Florida, to test the legality of Chapter 23616, Acts of 1947, appropriating $2,000,000.00 to be delivered to the United States Government to purchase land and establish the Everglades National Park. The real gist of the bill is in paragraph IX which reads:

> "The said Chapter violates Sections 2, 3 and 4 of Article IX of the Constitution of Florida, in that the appropriation attempted to be made constitutes a gift of the money belonging to the people of the State of Florida to the United States and the appropriation of said money is not a state purpose and the expenses to be made out of said fund are not state expenses."

Section 1 of the Act in question provides:

> "There is hereby appropriated out of the General Revenue Fund of the State of Florida the sum of Two Million Dollars ($2,000,000.00) for providing the State of Florida with a fund in such amount to be transferred by the State of Florida (by warrant upon requisition therefor by the Governor of the State of Florida) to the United States of America for use by the United States of America or the National Park Service thereof in paying for the acquisition of all privately owned and other lands and interests within the Everglades National Park area by the United States of America or the National Park Service thereof, and in paying for the costs and expenses required in connection with such acquisition."

Soon after filing the bill the Trustees of the Internal Improvement Fund were allowed to intervene. Likewise an order was entered allowing the Everglades National Park Commission to intervene.

The sufficiency of the bill was then tested upon motions to dismiss filed by defendant Larson and the two intervenors. The lower court granted the actions and the Attorney General Appeals.

In a large measure the Attorney General's contention rests on the assertion that the $2,000,000.00 is an outright gift to the federal government; that once paid the state has no control over the expenditure and no guarantee that it will be used to acquire and maintain a park.

To begin with the appropriation of public funds to establish public parks is not open to question. It is true that the means employed by the legislature in this case is indirect in that the funds were appropriated and directed paid to an agency over which it had no further control. This action resolves into a question of policy rather than law. We have reviewed the entire transaction and we cannot say that the executive and legislative branches of our state government have arbitrarily exceeded their authority or that their acts in bringing into being this park have been so unreasonable as to warrant an injunction to restrain them.

The grant is to a most responsible agency. The recipient

has no interest inconsistent with the legislative purpose.

This attack is directed at one link in a long official chain of events devoted to the purpose of creating the twenty-eighth national park to be known as the Everglades National Park. Whatever this court thinks of the legislative wisdom in creating the park is quite immaterial. The wisdom and policy must rest with the legislative branch of the government. This court cannot say that the general welfare of the state will not be served. It is a legislative prerogative to determine a state purpose to be served. It is perfectly obvious that for all time to come Florida, in particular, will reap immeasurable benefits from this park. Demand for the park has claimed the attention of the Legislature of Florida as far back as 1929 where by Chapter 13887 the Tropic Everglades National Park Commission was created for the purpose of acquiring lands and transferring same to the United States Government without cost. By legislative direction the commission was to work in full cooperation and harmony with the Department of the Interior in bringing about this park.

As far back as 1934 the National Congress approved this undertaking, 16 U. S. Code, Sec. 410. Thereafter it became a joint endeavor and purpose of the National and State Governments. Since then their duly authorized agencies have performed numerous acts to effectuate the common goal. Finally the legislature concluded that it was better policy to place these funds in the control of the United States Government to acquire the remaining lands found necessary for the park rather than have a state agency use the funds in acquiring the land. Otherwise stated, if the state could have acquired the lands and had given them to the federal government for a park then they might as well have given the money with which to buy the lands. This procedure has not been disapproved by other courts in similar cases. See Vreoman *v.* City of St. Louis, 337 Mo. 933, 88 S. W. (2d) 189; Woolwine *v.* Mason, 129 Tenn. 35, 157 S. W. 682; State ex rel. Third National Bank *v.* Smith, 107 Mo. 527, 17 S. W. 901; Hollenburg Music Co. *v.* Morris (Tex. Civ. App.) 35 S. W. 396.

This appropriation should not be condemned because the

title and management of the park will rest in the federal government. The privilege to enjoy the educational and recreational benefits will inure to the entire public to share in common with all the people. This court has frequently declined to enjoin the expenditure of the public funds where sought to promote recognized public functions. The rule is not limited to cases where the functionary is in the exclusive control of the state or a state agency. State *v.* Gordon, 138 Fla. 312, 189 So. 437; Lott *v.* City of Orlando, 143 Fla. 338, 196 So. 313; State *v.* Florida Keys Aqueduct Commission, 148 Fla. 485, 4 So. 2d 662; State *v.* City of Miami, 150 Fla. 270, 7 So. 2d 146; Board of Commissioners *v.* Board of Pilot Commissioners, 52 Fla. 197, 42 So. 698.

We find nothing in the Constitution which would preclude the legislature from enacting Chapter 23616 and no error in the decree appealed from and the same is affirmed.

Thomas, C. J., Terrell, Buford, Chapman, Sebring and Barns, J. J. concur.

EXHIBIT "B"

Sections 410, 410a, 410b, 410c and 410d, of title 16, of the United States Code, relating to the Everglades National Park, are as follows:

> 410. *Everglades National Park: establishment: acquisition of land.*—When title to all the lands within boundaries to be determined by the Secretary of the Interior within the area of approximately two thousand square miles in the region of the Everglades of Dade, Monroe, and Collier Counties, in the State of Florida, recommended by said Secretary, in his report to Congress of December 3, 1930, pursuant to the Act of March 1, 1929 (45 Stat. 1443), shall have been vested in the United States, said lands shall be, and are hereby, established, dedicated, and set apart as a public park for the benefit and enjoyment of the people and shall be known as the Everglades National Park: *Provided*, That the United States shall not purchase by appropriation of public moneys any land within the aforesaid

area, but such lands shall be secured by the United States only by public or private donation. May 30, 1934, c. 371, section 1, 48 Stat. 816.

410a. *Same; acceptance of title to lands.*—The Secretary of the Interior is hereby authorized, in his discretion and upon submission of evidence of title satisfactory to him, to accept on behalf of the United States, title to the lands referred to in section 410 of this title as may be deemed by him necessary or desirable for national-park purposes: *Provided,* That no land for said park shall be accepted until exclusive jurisdiction over the entire park area, in form satisfactory to the Secretary of the Interior, shall have been ceded by the State of Florida to the United States. May 30, 1934, c. 371, section 2, 48 Stat. 816.

410b. *Same: administration, protection, and development.*—The administration, protection, and development of the aforesaid park shall be exercised under the direction of the Secretary of the Interior by the National Park Service, subject to the provisions of sections 1, 2-4, of this title: *Provided,* That the provisions of sections 791-825r of this title shall not apply to this park: *Provided further,* That nothing in sections 410-410c of this title shall be construed to lessen any existing rights of the Seminole Indians which are not in conflict with the purposes for which the Everglades National Park is created. May 30, 1934, c. 371, section 3, 48 Stat. 816; Aug. 21, 1937, c. 732, 50 Stat. 742.

410c. *Same: preservation of primitive condition.*—The said area or areas shall be permanently reserved as a wilderness, and no development of the project or plan for the entertainment of visitors shall be undertaken which will interfere with the preservation intact of the unique flora and fauna and the essential primitive natural conditions now prevailing in this area. May 30, 1934, c. 371, section 4, 48 Stat. 817.

410d. *Same: acceptance and protection of property pending establishment of park: publication of estab-*

lished order.—(a) For the purpose of protecting the scenery, the wildlife, and other natural features of the region authorized to be established as the Everglades National Park by sections 410-410c of this title, notwithstanding any provision contained in said sections, the Secretary of the Interior is authorized in his discretion to accept on behalf of the United States any land, submerged land, or interests therein, subject to such reservations of oil, gas, or mineral rights as the Secretary may approve, within the area of approximately two thousand square miles recommended by said Secretary in his report to the Congress of December 3, 1930, pursuant to the Act of March 1, 1929 (45 Stat. 1443); *Provided,* That no general development of the property accepted pursuant to this section shall be undertaken nor shall the park be established until title satisfactory to the Secretary to a major portion of the lands, to be selected by him, within the aforesaid recommended area shall have been vested in the United States: *Provided further,* That until the property acquired by the United States pursuant to this section has been cleared of the aforesaid reservation, the Secretary in his discretion shall furnish such protection thereover as may be necessary for the accomplishment of the purposes of this section: *And provided further,* That in the event the park is not established within ten years from December 6, 1944, or upon the abandonment of the park at any time after its establishment, title to any lands accepted pursuant to the provisions of this section shall thereupon automatically revest in the State of Florida or other grantors of such property to the United States.

(b) Upon the execution of the aforesaid provisions relating to establishment thereof, the Everglades National Park shall be established by order of the Secretary which shall be published in the Federal Register. Dec. 6, 1944, c. 508, 58 Stat. 794.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 605

J. TOM WATSON, AS ATTORNEY GENERAL OF THE STATE OF FLORIDA,

Petitioner,

vs.

J. EDWIN LARSON, AS TREASURER OF THE STATE OF FLORIDA, ET AL.,

Respondents

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

LEROY COLLINS,
LAWRENCE A. TRUETT,
JULIUS F. PARKER,
WILL M. PRESTON,
Attorneys for Respondents.

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STATEMENT OF THE CASE

Review by Certiorari is sought under Sec. 344 (b) Title 28 Judicial Code by the Attorney General of Florida who was the plaintiff in the original cause in the Circuit Court for Leon County, Florida. The propriety of such review is denied by the Treasurer of Florida, the Trustees of the Internal Improvement Fund, and the Everglades National Park Commission, statutory agencies of said state, all being defendants in the Court of original jurisdiction.

The bill of complaint by which the Petitioner's grievances were set forth (R. 1-4) contains not a single allegation of the violation of any clause or section of the United States Constitution. The relief sought was an injunction against the expenditure of two million dollars of state funds. The Circuit Court of the state dismissed the bill on motion because it was found insufficient. The Supreme Court of Florida reviewed the case and unanimously affirmed the Circuit Court (R. 19-21). In its decision the Supreme Court of Florida found:

> "The real gist of the bill is in paragraph IX which reads:
>
> > 'The said Chapter violates Sections 2, 3 and 4 of Article IX of the Constitution of Florida, in that the appropriation attempted to be made constitutes a gift of the money belonging to the people of the State of Florida to the United States and the appropriation of said money is not a state purpose and the expenses to be made out of said fund are not state expenses.' "

ARGUMENT

The Petition should be denied on the following grounds:

I

The Petitioner Shows No Personal Interest Sufficient To Invoke the Jurisdiction of This Court

The Petitioner brought the original proceeding, prosecuted his appeal to the State Supreme Court, and filed his petition herein in his official capacity "as Attorney General of the State of Florida." In a long line of cases this Court has held that to invoke jurisdiction here a party raising a question of the constitutionality of a state act must show that he is *personally* interested in and adversely affected by the decision of the state court upholding the act. Braxton County Court v. West Virginia ex rel. Dillon, 208 U. S. 192, 52 L. ed. 450; Smith v. Indiana, 191 U. S. 138, 148, 48 L. Ed. 125, 126, 25 Sup. Ct. Rep. 51; Caffrey v. Oklahoma, 177 U. S. 346, 44 L. Ed. 799, 20 Sup. Ct. Rep. 664; Columbus & G. Ry. Co., et al v. Miller State Tax Collector, 283 U. S. 96, 75 L. ed. 866, 51 Sup. Ct. Rep. 392; Alabama State Federation of Labor, et al v. McAdory, Ala. 1945, 65 Sup. Ct. Rep. 1384, 325 U. S. 450, 89 L. ed. 1725; Voeller v. Neilston Warehouse Co., Ohio 1941, 61 Sup. Ct. Rep. 376, 311 U. S. 531, 85 L. Ed. 322; Samuel Stewart as Treas. of Wyandotte Co., Kansas v. City of Kansas City, 239 U. S. 14, 66 L. ed. 121, 36 Sup. Ct. Rep. 15; Thomas R. Marshall as Gov. of State of Indiana, et al vs. John T. Dye, 231 U. S. 250, 34 Sup. Ct. Rep. 92, 58 L. ed. 208.

In Braxton County Court v. West Virginia ex rel. Dillon, supra, it was stated squarely that:

> "Again, that the act of the state is charged to be in violation of the national Constitution, and that the charge is not frivolous, does not always give this court

jurisdiction to review the judgment of a state court. The party raising the question of constitutionality and invoking our jurisdiction must be interested in, and affected adversely by, the decision of the state court sustaining the act, and the interest must be of a personal, and not of an official, nature."

The Court further quoted with approval from Smith v. Indiana, supra, the following:

> " 'These authorities control the present case. It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their nonperformance was equally so. He neither gained nor lost anything by invoking the advice of the supreme court as to the proper action he should take. He was testing the constitutionality of the law purely in the interest of third persons, viz., the taxpayers; and in this particular the case is analogous to that of Caffrey v. Oklahoma, 177 U. S. 346, 44 L. ed. 799, 20 Sup. Ct. Rep. 664. We think the interest of an appellant in this court should be a personal, and not an official, interest, and that the defendant, having sought the advice of the courts of his own state in his official capacity, should be content to abide by their decision.' "

Directly in point also is the following expression from Columbus & G. Ry. Co. v. Miller, supra,

> "While, so far as state practice is concerned, the authority of a public officer to assail in the courts of the state the constitutional validity of a state statute is a local question, this fact does not alter the fundamental principle, governing the determination of the federal question by this court, that the protection of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasions of personal or property rights or through the discriminations which the amendment forbids. The constitutional guaranty does not extend to the

mere interest of an official, as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws."

II

The Questions Are Moot by Reason of Payment of Appropriated Amount by State of Florida To United States of America

Affidavit of J. Edwin Larson, one of the Respondents in this case, affirmatively shows that the warrant issued by the Governor of the State of Florida in accordance with the appropriation contained in Chapter 23616, Laws of Florida, Acts of 1947, and payment thereof in all respects has been completed and as Treasurer he has no further control or authority of any kind over the use of said funds (R. 26). The Bill of Complaint is bottomed and predicated upon enjoining the payment of the funds appropriated by Chapter 23616, Laws of Florida, Acts of 1947, in that the four lengthy sections therein (V, VI, VII and VIII) relating to boundaries of the Everglades National Park, oil rights and fishing privileges do not pretend to show any violation or purported violation of statutory or constitutional law (R. 1-4). Such payment is a fait accompli and there is nothing left to enjoin.

As to the Petitioner and his petition, the questions present merely mock issues and are moot. The petition should not be entertained by the Court, in that on a bill to restrain a public officer from paying money that has been paid, the question of right is a moot question. Wilson v. Shaw, 204 U. S. 24, on appeal to the Supreme Court of the United States, was an action to restrain the Secretary of the Treasury of the United States from paying $40,000,000

and $10,000,000 in connection with the construction of the Panama Canal, after the amounts had been paid, was held moot; Duke Power Company v. Greenwood County, 299 U. S. 259; and City of Clearwater, Florida v. Beers (Circuit Court of Appeals, Fifth Circuit), 90 F. 2d 80.

In Wilson v. Shaw, supra, Justice Brewer said:

> "If the bill was only to restrain the Secretary of the Treasury from paying the specific sums named therein, to wit, $40,000,000 to the Panama Canal Company, and $10,000,000 to the Republic of Panama, it would be sufficient to note the fact, of which we may take judicial notice, *that those payments have been made, and that whether they were rightfully made or not is, so far as this suit is concerned, a moot question.* Cheong Ah Moy v. United States, 113 U. S. 216, 28 L. ed. 983, 5 Sup. Ct. 431; Mills v. Green, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; American Book Co. v. Kansas, 193 U. S. 49, 48 L. ed. 613, 24 Sup. Ct. Rep. 394; Jones v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611."

In Duke Power Company v. Greenwood County, supra, the opinion of this Court reads in part as follows:

> "Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss. See United States v. Hamburg-Amerikanische Packetfahrt-Actien Gessellschaft, 239 U. S. 466, 475, 478, 60 L. ed. 387, 391, 392, 36 S. Ct. 212; Atherton Mills v. Johnson, 259 U. S. 13, 16, 66 L. ed. 814, 816, 42 S. Ct. 422; Brownlow v. Schwartz, 261 U. S. 216, 218, 67 L. ed. 620, 622, 43 S. Ct. 263; United States v. Anchor Coal Co. 279 U. S. 812, 73 L. ed. 971, 49 S. Ct. 262."

In City of Clearwater v. Beers, supra, Circuit Judge Holmes said:

> "It is well settled that courts refuse to pass upon moot questions."

and cited numerous decisions of the Supreme Court of the United States in support of such well-settled rule of law.

III

The Appeal Is Frivolous

A Federal constitutional question was not directly or indirectly raised or presented in Petitioner's pleadings or otherwise in the Circuit Court in and for Leon County, Florida, the court of original jurisdiction (R. 1-4). The Supreme Court of Florida evidently recognized the frivolous nature of the fourth, fifth, ninth and tenth assignment of errors (R. 19-21) which purportedly but without foundation in pleading or otherwise asserted certain Federal questions. Only the tenth assignment mentions the constitution of the United States (R. 21). Certainly that court recognized its previous ruling in Lee v. Atlantic Coast Line Railroad Company, 194 So. 252, 267, 268, where it held that questions not involved in the pleadings nor presented to the lower court would not be discussed on review, and said ". . . we fail to find where this question was presented to the lower court . . . nor do we find it involved in the pleadings. Therefore, we shall not discuss it." The record is barren of any contention that the Florida Statute in question was repugnant to the Federal constitution (R. 1-18) until the unjustified and impotent appearance of the aforesaid four assignment of errors after the case had gone against Petitioner in the Circuit Court.

A further reason in support of this ground is that the bill of complaint filed in the Circuit Court in and for Leon County, Florida, sought (in the words of Petitioner) a declaratory decree under chapter 87, Cumulative Supplement to Florida Statutes, 1941, as to the construction, validity and constitutionality of said chapter 23616, Laws

of Florida, Acts of 1947 (R. 2-3). In the Circuit Court Petitioner asked for answers to five (5) questions (R. 4), including advice as to whether certain sections of the constitution of Florida were violated (section IX of Bill of Complaint (R. 3-4). The character and type of Petitioner's declaratory judgment action (R. 1-4) and the subsequent attempt to have the four assignment of errors supply a deficiency in pleadings and other presentation in the lower court as to Federal constitutional questions negatives the soundness of Petitioner's position in this Court. Petitioner sought a declaratory judgment and alleged certain violations of the Florida constitution; he lost in the court of original jurisdiction; and he then filed certain assignments of errors purporting to set up violations of the Federal constitution and in an obvious attempt to set up or save Federal questions unsupported by his pleadings or other presentations in the court of original jurisdiction.

In item 1 of Specification of Errors (page 10 of Petition) the contention is made that the Secretary of the interior has no legal right to accept and utilize the appropriated funds. This question was not raised or presented by the bill of complaint or otherwise in the Circuit Court in and for Leon County, Florida. Legal falderal is ineffective to litigate questions in this Court which were not raised in the court of original jurisdiction by way of pleadings or otherwise but which were sought to be raised subsequent to post-dismissal decree by abortive assignments of errors not based upon the record.

IV

There Is Not Presented a Federal Question Under Subsection (b) of Section 344, Title 28 of United States Code

All that has been said under point II is applicable to this discussion.

Careful search of the Bill of Complaint (R. 1-4) and all other proceedings in the Circuit Court in and for Leon County, Florida (R. 5-18) will show that the validity of the Florida Statute was not drawn in question on the ground of it being repugnant to the constitution of the United States. Since no such ground was presented to said Circuit Court or considered by such Court and since any purported repugnancy raised on appeal was not properly before the Supreme Court of Florida for consideration or even discussion this Court has no jurisdiction of the matter under Section 344 (b) of Title 28 of the United States Code. A long line of decisions of this Court supports this well-established rule of law. For example, see Scudder v. New York, 175 U. S. 32, where it was held that failure to raise a Federal question until after a case has been finally decided in the highest state court will preclude a writ of error to the Supreme Court of the United States.

What Petitioner did was to frame his whole case in the Circuit Court on purported violations of the Florida constitution. The decision of the Supreme Court of Florida shows that the real gist of the Bill of Complaint was the violation of certain provisions of the Florida constitution (R. 27). Such questions do not come within Section 344(b) of Title 28 of the United States Code and hence Federal questions are not involved in this case. It is impossible upon the record in this case to avoid the conclusion that it never occurred to Petitioner to raise Federal questions

until after the case had been finally decided against him in the Circuit Court. No such grounds having been presented, it cannot be said that the Circuit Court and the Supreme Court of Florida have disregarded the constitution of the United States. Hence, this Court has no jurisdiction.

V

Application of Section 5(a) of Rule 38 or the Rules of the Supreme Court Justify Denial of Petition For Writ of Certiorari

Section 5 of this Rule 38 recognizes that a review on writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only when there are special and important reasons therefor. One of the factors for consideration is where a state court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

First, no Federal question of substance was presented to either the Circuit Court in and for Leon County or the Supreme Court of Florida. Secondly, if such a question had been so decided, it was in accord with an applicable decision of this Court. In Via v. State Commission on Conservation, 9 F. Supp. 556, a suit seeking to invalidate the proceedings taken by defendant to establish the Shenandoah National Park on Federal and other constitutional grounds was dismissed. On appeal to this Court the decree was "affirmed on the ground that appellant has an adequate remedy at law." 296 U. S. 549. If any of the monies delivered to the Federal Government by the State of Florida under the Florida Statute in question are ever used by the Federal Government to take or condemn prop-

erty, then the affected party, whether he be the Petitioner or a land owner, will have his day in court through an adequate remedy at law.

The assailed Florida Statute has for its purpose one of the plans, methods and arrangements with the United States of America for the immediate creation, establishment and development of the Everglades National Park. Such acts have been upheld uniformly and there are no cases to the contrary.

In re Opinion of the Justices,
(Mass.), 8 N. E. 2d 753;

Yarborough v. North Carolina Park Commission,
(N. C.) 145 S. E. 563; and

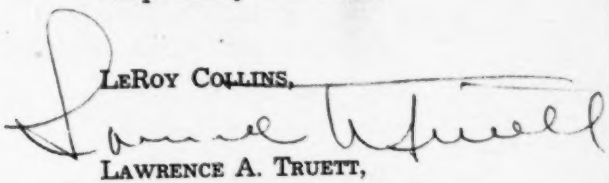
King v. Sheppard,
(Texas) 157 S. W. 2d 682.

It follows that by reason of the decisions of this Court and courts of other jurisdictions the decision of the Florida Supreme Court was in strict accord with all decisions affecting the establishment of national parks through cooperation of a State of this nation.

CONCLUSION

The questions are moot. The Petitioner shows no personal interest. There is no substantial Federal question involved. The nonfederal questions are genuine and adequate. A denial of the Petition For Writ of Certiorari is fully justified.

Respectfully submitted,



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Receipt of a copy of the foregoing brief is acknowledged this...11th.....day of March, A. D. 1948.

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_____

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